

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARIO ATKINS,

Plaintiff,

v.

TODD PACIFIC SHIPYARDS, INC.,

Defendant.

CASE NO. C06-0883-JCC

ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment (Dkt. No. 41), Plaintiff's Response in opposition (Dkt. No. 45), and Defendant's Request to Strike Plaintiff's Response and Reply (Dkt. No. 47). Defendant's Request to Strike Plaintiff's Response stems from the fact that Plaintiff's Response was due the Monday before the noting date, on March 24, 2008. Local Rules W.D. Wash. CR 7(d)(3). Plaintiff filed his Response on March 27, 2008, three days late. However, because Plaintiff is proceeding *pro se*, and the Ninth Circuit generally affords *pro se* litigants some leniency in their compliance with the technical rules of civil procedure, *see Draper v. Coombs*, 792 F.2d 915, 924 (9th Cir. 1986), the Court will consider Plaintiff's untimely papers. Defendant also requests that the Court strike certain portions of the Response and the declaration and exhibits offered in opposition to

1 the motion, on grounds that they contain inadmissible hearsay and are not properly authenticated. (Reply  
2 1–2 (Dkt. No. 47).) However, again because Plaintiff is proceeding *pro se*, the Court will not strike  
3 Plaintiff’s papers. The Court has carefully considered all of the papers submitted in support of and against  
4 the motion, including their declarations and exhibits, and has determined that oral argument is not  
5 necessary. The Court hereby DENIES IN PART and GRANTS IN PART Defendant’s Motion for  
6 Summary Judgment and rules as follows.

7 **I. BACKGROUND**

8 *Pro se* Plaintiff Mario Atkins is an African-American former employee of Todd Pacific Shipyards  
9 Corporation (“Todd”) (erroneously identified on the Court’s docket as Todd Pacific Shipyards, Inc.).  
10 (Def.’s Mot. 1–2 (Dkt. No. 41).) On November 18, 2005, Plaintiff filed a Charge of Discrimination with  
11 the U.S. Equal Employment Opportunity Commission (EEOC) and the Washington State Human Rights  
12 Commission, alleging that he was discriminated against on the basis of his race and color, and retaliated  
13 against for complaining to his employer’s human resources department, in violation of Title VII of the  
14 Civil Rights Act of 1964. (Dkt. No. 1-2.) Specifically, he alleged that during his employment at Todd, he  
15 was:

16 subjected to racial harassment, including physical assaults. I was referred to as ‘boy’ and  
17 ‘black dog’. In May, 2005, when I was getting water from a fountain in the rigging  
18 department, another employee told me, ‘This water is for White boys only. You Black  
19 guys got to pay.’ A former employee who was not supposed to be in the yard because he  
20 had been fired, walked past me in May, 2005 and called me “boy”. On or about August  
21 15, 2005, I was forced to take a constructive discharge due to the ongoing racial  
22 harassment, and the Company’s failure to take sufficient action to stop it.

23 I reported the racial harassment to human resources many times, beginning in 2002. An  
24 incident occurred on June 15, 2005 in which I was struck in the back by an object. I  
25 reported it to human resources but nothing was done until they learned I had filed a police  
26 report. To my knowledge, no discipline was taken against the person who threw the  
object. I further believe that most of the harassment I have been subjected to was  
retaliation for my complaints about racial harassment to human resources.

(Dkt. No. 1-2 at 3.) On March 23, 2006, the EEOC issued a Dismissal and Notice of Rights to Plaintiff,  
notifying him that the EEOC was unable to conclude that the information obtained in its investigation of

1 Plaintiff's employment discrimination complaints established a violation of Title VII of the Civil Rights  
2 Act. (Dkt. No. 1-3.) On June 22, 2006, Plaintiff filed a Complaint in this Court, as an attachment to an  
3 application for leave to file the action *in forma pauperis*. In his Complaint, Plaintiff stated that the basis  
4 of his claim was "the same complaint made to the EEOC. Hostile work environment. Had to take  
5 constructive discharge." (Compl. (Dkt. No. 1-2 at 2).) He also attached the EEOC Charge of  
6 Discrimination, quoted above. On June 12, 2007, United States Magistrate Judge James P. Donohue  
7 denied Plaintiff's request for court-appointed counsel. (Dkt. No. 14.) Plaintiff requested court-appointed  
8 counsel a second time, on August 31, 2007, and again, Magistrate Judge Donohue denied the motion.  
9 (Dkt. No. 27.)

10 Plaintiff filed an Amended Complaint on September 18, 2007, using a standard form "Civil Rights  
11 Complaint Under 42 U.S.C. § 1983." (Dkt. No. 29.) Defendant filed an Answer to the Amended  
12 Complaint on October 9, 2007. (Dkt. No. 32.) In the instant motion, Defendant asks the Court to dismiss  
13 Plaintiff's suit at the summary judgment stage, on grounds that: (1) Plaintiff's claims are time-barred; (2)  
14 Plaintiff has erroneously identified the Defendant; and (3) Plaintiff has failed to state a claim for which  
15 relief can be granted. (Def.'s Mot. 1 (Dkt. No. 41).)

## 16 **II. APPLICABLE STANDARD**

17 Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file,  
18 and any affidavits show that there is no genuine issue as to any material fact and that the movant is  
19 entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "A 'material' fact is one that is relevant  
20 to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec.*  
21 *Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears  
22 the initial burden of showing that no genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*  
23 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the moving party meets this initial burden, then the  
24 party opposing the motion must set forth facts showing that there is a genuine issue for trial. *See T.W.*  
25 *Elec. Serv.*, 809 F.2d at 630. The party opposing the motion must "do more than simply show that there

1 is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. “In response to a  
 2 summary judgment motion, . . . the plaintiff can no longer rest on . . . mere allegations, but must set forth  
 3 by affidavit or other evidence specific facts, . . . which for the purposes of the summary judgment motion  
 4 will be taken to be true.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); FED. R. CIV. P.  
 5 56(e). If the nonmoving party fails to establish the existence of a genuine issue of material fact, “the  
 6 moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24  
 7 (1986).

### 8 **III. ANALYSIS**

#### 9 **A. Plaintiff Has Not Abandoned His Title VII Claim**

10 In his initial Complaint, Plaintiff stated that his claims in this Court were the same as those alleged  
 11 in his EEOC Charge, which were grounded in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §  
 12 2000e *et seq.* (Dkt. No. 3.) Plaintiff filed an Amended Complaint on September 18, 2007, using a  
 13 standard form “Civil Rights Complaint Under 42 U.S.C. § 1983,” alleging that:

14 I was hired by Todd Shipyard in June 1999. My most recent position was a painter[.]  
 15 Throughout [sic] my employment I was subject to racial harassment, racial slurs[.] I was  
 16 called a boy repeatedly, under the new federal court ruling is a racial slur. I was assaulted  
 17 twice [,] one [sic] which cause [sic] a life long injury. I was laid off as a helper, then my  
 job position was eliminated. I was exposed to a hangman noose in supervisor office.<sup>1</sup> I was  
 forced to take a constructive discharge Nov. 2005[.] After I felt threatening. Hostile work  
 environment retaliation.

18 (Am. Compl. (Dkt. No. 29 at 3).) Defendant’s motion largely rests on its contention that Plaintiff  
 19 abandoned his Title VII claims and is now alleging § 1983 claims. (*See* Defs.’ Mot. 4 (Dkt. No. 41).) To  
 20 succeed on a claim under 42 U.S.C. § 1983, a plaintiff must prove that he was:

21 deprived of a right secured by the Constitution or laws of the United States, and that the  
 22 alleged deprivation was committed under color of state law. Like the state-action

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23 <sup>1</sup>Plaintiff describes this incident as follows: “Kevin Fish [Plaintiff’s supervisor] called me in his  
 24 office were [sic] he had a hangman noose on his file cabinet. He said I need to do more to get along with  
 25 leadmen[.] I told him I’m not going to kiss any ones [sic] ass then I was laid off about 2 weeks later.”  
 (Pl.’s Answer to Def.’s Interrog. No. 5 (Dkt. No. 42 at 12).)

1 requirement of the Fourteenth Amendment, the under-color-of-state-law element of  
2 § 1983 excludes from its reach merely private conduct, no matter how discriminatory or  
wrongful[.]

3 *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (internal quotation omitted). In other  
4 words, “the party charged with the deprivation must be a person who may fairly be said to be a state  
5 actor.” *Id.* at 50. The Court is not convinced that Plaintiff intended to abandon his Title VII claims, given  
6 the fact that nowhere does he allege that Defendant acted under color of law to deprive him of a  
7 constitutional right. Further, Defendant is a private employer, (Def.’s Mot. 14 (Dkt. No. 41)), and  
8 Plaintiff has not alleged otherwise, and presents no evidence that Defendant may “fairly be said to be a  
9 state actor.” Moreover, in his Response to Defendant’s motion, Plaintiff continues to refer to alleged  
10 violations of Title VII. (Dkt. No. 45 at 2.) The Court finds it more likely that Plaintiff mistakenly used the  
11 wrong form to file his Amended Complaint. To the extent that Plaintiff did intend to state any § 1983  
12 claims, however, the Court DISMISSES them as unsupported by the evidence.

13 The remainder of this Order will address Defendant’s arguments relating to Plaintiff’s Title VII  
14 claims.

### 15 **B. The Statute of Limitation**

16 A prerequisite for a Title VII private party action is a timely filed EEOC charge. In Washington,  
17 the charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice  
18 occurred. *See* 42 U.S.C. § 2000e-5(e); HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, 1 LITIGATING  
19 EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS CASES § 6.5 (2005).

20 Plaintiff filed his EEOC Charge on November 18, 2005. (Dkt. No. 1-2 at 3.) Therefore,  
21 Defendant argues, any of Plaintiff’s claims that are based on allegedly unlawful actions that occurred  
22 before January 22, 2005, are not timely and must be barred. These would include:

- 23 (1) Plaintiff’s claim that a co-worker called him “boy” repeatedly in August 2002 (Am.  
24 Compl. 3 (Dkt. No. 29); Pl.’s Resp. (Dkt. No. 45 at 3)), and “black dog” (Compl. (Dkt.  
25 No. 3)) or “big dog” in 2001 to 2003 (Dkt. No. 46 at 27, 31), and that his supervisor

called him “big dog”<sup>2</sup> (Pl.’s Interrog. No. 1 (Dkt. No. 46 at 49));

- (2) Plaintiff’s claim that he was assaulted in September 2003,<sup>3</sup> when he was kicked in the foot twice by a co-worker (Pl.’s Resp. (Dkt. No. 45 at 2)), allegedly resulting in the appearance of a ganglion cyst on his left foot six or seven months later;
- (3) Plaintiff’s claim that he was laid off as a helper and his position was eliminated in 2003 (Am. Compl. 3 (Dkt. No. 29); Def.’s Answer to Pl.’s Interrog. No. 4, 5 (Dkt. No. 46 at 50)); and
- (4) Plaintiff’s claim that he was exposed to a “hangman noose” in his supervisor’s office in 2003 (Am. Compl. 3 (Dkt. No. 29); Pl.’s Answer to Def.’s Interrog. No. 5 (Dkt. No. 42 at 12); Def.’s Mot. 11 (Dkt. No. 41)), as well as a black stuffed gorilla hanging in an old rigging loft (Pl.’s Resp. (Dkt. No. 45 at 3)).

Claims based on the following actions would not, under Defendant’s theory, be barred because the actions occurred within the statutory period:

- (1) Plaintiff’s claim that a co-worker called him “boy” once in May 2005 (Compl. (Dkt. No. 3));
- (2) Plaintiff’s claim that in May 2005 he was told by a co-worker that “This water [from a water fountain] is for White boys only. You Black guys got to pay.” (Compl. (Dkt. No. 3));
- (3) Plaintiff’s claim arising out of a June 15, 2005 incident in which he was struck on the back by a piece of wood (Compl. (Dkt. No. 3); Am. Compl. 3 (Dkt. No. 29); Pl.’s Resp. (Dkt. No. 45 at 2)); and
- (4) Plaintiff’s claim that he was forced to take a constructive discharge in November 2005 after he felt threatened (Am. Compl. 3 (Dkt. No. 29)) and Defendant failed to take sufficient action to stop the racial harassment (Compl. (Dkt. No. 3)).

To the extent that Plaintiff seeks to recover for discrete retaliatory or discriminatory acts that occurred before January 22, 2005, such claims are barred. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 (2002) (holding in part that a party must file a charge within 300 days of the date of

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<sup>2</sup>It is unclear when Plaintiff alleges this incident to have happened, but Plaintiff includes it in the same exhibit in which he alleges other incidents of being called “big dog” during 2001–2003. (Dkt. No. 46 at 27–29.)

<sup>3</sup>A Seattle Police Report of May 28, 2003, submitted to the Court by Plaintiff, notes that Plaintiff reported the foot-kicking incident to Police as taking place on October 2, 2002. (Dkt. No. 46 at 3.)

1 the discrete retaliatory or discriminatory act or lose the ability to recover for it). However, to the extent  
2 that Plaintiff relies upon these incidents to prove a hostile workplace claim, the Court may consider all the  
3 acts, even ones that fall outside the statutory period, so long as all acts which constitute the claim are part  
4 of the same unlawful employment practice and at least one act contributing to the claim occurs within the  
5 statutory period. *Id.* at 122. The Court finds that Plaintiff's claim that he was laid off as a helper on the  
6 basis of race is a discrete act that Plaintiff may not recover for now because the act occurred outside the  
7 statutory period. *See id.* at 114 (describing termination or refusal to hire as easily identifiable "discrete  
8 acts"). However, because the Court construes Plaintiff's hostile work environment claim as alleging that  
9 Defendant engaged in an unlawful employment practice by failing to respond to or correct the  
10 constellation of acts above, and because some of those acts allegedly occurred within the statutory  
11 period, the Court will not dismiss the majority of Plaintiff's claims merely because they fall outside the  
12 statutory period.

### 13 C. The Longshore and Harbor Worker's Compensation Act

14 Defendant next argues that Plaintiff's claim with respect to the alleged assault involving Plaintiff's  
15 being struck in the back with a piece of wood by another employee in June 2005 is barred by the  
16 Longshore and Harbor Worker's Compensation Act (the "LHWCA"), 33 U.S.C. § 901 *et seq.* (Def.'s  
17 Mot. 12 (Dkt. No. 41).) Plaintiff describes the pertinent incident as follows: "An incident occurred on  
18 June 15, 2005 in which I was struck in the back by an object. I reported it to human resources but  
19 nothing was done until they learned I had filed a police report. To my knowledge, no discipline was taken  
20 against the person who threw the object." (Compl. (Dkt. No. 3 at 3).) The Seattle Police Report that  
21 Plaintiff submitted in support of this claim states that:

22 Victim stated that he wrenched his back—no medical exam. . . . [He reported] that he was  
23 assaulted at his workplace. [He] stated that he was bent over performing work duties 06-  
24 15-05 1330–1400 hrs when he was struck in the back by an unknown object causing [him]  
25 to twist an [sic] wrench his back. [He] stated he did not see the object that was thrown at  
[He] stated that the object  
that struck him was thrown by an electrician working from a scissor lift at Todd Shipyard.  
[He] stated that his employer knows who struck [him] with the unknown object.

1 (Police Report June 15, 2005 (Dkt. No. 46 at 5).) Plaintiff also submitted a December 12, 2005 letter  
2 from Nathan Ford, Manager of Labor Relations at Todd, to the EEOC in response to Plaintiff's Charge,  
3 describing the incident as follows:

4 On June 16, 2005 Mr. Atkins and Jimmie Wells were involved in an altercation of a  
5 physical nature. As is Todd Pacific Shipyards Corporation practice both individuals were  
6 suspended pending investigation. It was quickly determined that Mr. Atkins was not at  
7 fault, he was returned the next day and was paid for the time he missed. Mr. Wells  
8 received a 3 day suspension without pay. Therefore Mr. Atkins claim that no discipline  
9 was taken is incorrect.

10 (Dkt. No. 46 at 21.)

11 The LHWCA "is a workmen's compensation statute that provides specified benefits to covered  
12 maritime workers who are injured in employment related accidents[.]" FORCE, ROBERT & NORRIS,  
13 MARTIN J., 1 THE LAW OF MARITIME PERSONAL INJURIES § 2:1 (5th ed. 2004). Under the LHWCA,  
14 "employees are assured of hospital and medical care and subsistence during the convalescence period. . . .  
15 Employees, on the other hand, ordinarily give up the right of suit for a variety of damages for personal  
16 injuries against employers in return for the certainty of compensation payments as recompense for those  
17 injuries." *Id.* (citing *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 282 n.24 (1980)).

18 Plaintiff is not bringing a tort claim for personal injuries based on this incident, and submits no  
19 evidence of medical costs or other economic damage stemming from it. Rather, Plaintiff is alleging hostile  
20 work environment and retaliation claims under Title VII, and cites this incident as evidence that  
21 Defendant knew of the alleged racial harassment and failed to take adequate remedial measures to correct  
22 it. Accordingly, the Court is not persuaded by Defendant's argument that Plaintiff's Title VII claims are  
23 barred in any way by the LHWCA.

#### 24 **D. Defendant's Identity**

25 Defendant points out that in his original and amended Complaints, Plaintiff has misidentified the  
26 defendant as "Todd Pacific Shipyards, Inc.," "Todd Shipyard Inc.," and "Todd Pacific Shipyards." (Def.'s  
27 Mot. 13 (Dkt. No. 41).) The Court will permit amendment of the Amended Complaint to correctly

1 identify Defendant as “Todd Pacific Shipyards Corporation.”

2 **E. Plaintiff’s Claim for Relief Under Title VII**

3 Based on its position that Plaintiff abandoned his Title VII claims, Defendant’s only substantive  
4 arguments challenging Plaintiff’s Title VII claims are contained in a footnote, in which Defendant argues  
5 that Plaintiff fails to state a claim. (Def.’s Mot. 19 n.3 (Dkt. No. 41 at 19).) More specifically, Defendant  
6 argues that Plaintiff cannot hold Defendant liable for harassment under either a theory of vicarious  
7 liability for the acts of a supervisor or negligence in responding to harassment by a co-worker. (Def.’s  
8 Mot. 19 n.3 (Dkt. No. 41).) *See Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). As to the  
9 latter theory, Defendant argues that Plaintiff cannot prove his employer knew or should have known of  
10 the harassment but did not take adequate steps to address it, *see Swinton*, 270 F.3d at 803, because  
11 Defendant “investigated and took prompt remedial action every time Plaintiff complained of racially  
12 motivated mistreatment by coworkers[.]” (Def.’s Mot. 19 n.3 (Dkt. No. 41).) Defendant cites no support  
13 for this conclusory statement. There is, however, some evidence in a supporting declaration that after  
14 Plaintiff complained, in 2002, of racial harassment by co-worker Lee Sherman, who allegedly repeatedly  
15 called Plaintiff “boy,” Defendant’s Manager of Labor Relations, Nathan Ford, told Mr. Sherman that his  
16 behavior was in violation of company policy and warned Mr. Sherman that any further violations would  
17 result in severe discipline. (Ford Decl. ¶ 6 (Dkt. No. 43 at 2).) Whether this remedial action was enough  
18 to address the problem remains to be determined; it appears that Mr. Sherman’s inappropriate conduct  
19 persisted, since his employment was ultimately terminated on February 7, 2006, after Plaintiff left in  
20 August 2005, for having made a racial slur. (Def.’s Answer to Pl.’s Interrog. No. 17 (Dkt. No. 46 at 60).)  
21 Defendant has put forth no evidence of other remedial action, such as diversity training or the like, in  
22 response to this repeated conduct by Mr. Sherman. Additionally, Defendant’s argument with respect to  
23 Plaintiff’s allegation that Mr. Sherman called him “boy” in May 2005 relies upon a disputed issue of fact:  
24 Defendant claims that because Mr. Sherman was working at a different facility than Plaintiff by May  
25 2005, the incident could not have happened when Plaintiff claims it did. (Ford Decl. ¶ 6 (Dkt. No. 43 at

3.) As such, the circumstances of the alleged harassment and the question whether Defendant's response was adequate with regard to these allegations is not appropriate for disposition at summary judgment. Moreover, although there is some evidence that Defendant responded to Plaintiff's complaint about being hit in the back by co-worker Jimmie Wells, Defendant's remedial action appears to have been to suspend Mr. Wells without pay for three days because he refused to cooperate with the investigation. (Ford Decl. ¶ 8 (Dkt. No. 43 at 4).) It is not clear to the Court that Defendant, as a matter of law, took adequate remedial steps to address Plaintiff's complaints about being harassed.

As for Defendant's argument that Plaintiff cannot hold Defendant liable under a vicarious liability theory for harassment by a supervisor, the Court is again unpersuaded. Defendant argues that it "exercised reasonable care to prevent and correct promptly any harassment and Plaintiff did not complain or take advantage of any preventative or corrective opportunities provided by Todd." (Def.'s Mot. 19 n.3 (Dkt. No. 41).) However, again, Defendant fails to cite any evidence to support this conclusory statement. If proven, Plaintiff's allegations about the noose in his supervisor's office and about the black stuffed gorilla hanging in a rigging loft could be bases for vicarious liability. (*See* Pl.'s Resp. (Dkt. No. 45 at 3).) Plaintiff refers to an instance in which Defendant's former president observed the hanging gorilla and told Plaintiff's supervisor (via Mr. Ford) that the gorilla had to come down. (*Id.*) Plaintiff claims that despite this admonishment, the gorilla was still hanging when he was laid off as a helper. (*Id.*) If the supervisor displayed a noose and a hanging black gorilla in spite of management's instructions to take it down, such would not indicate that Defendant took reasonable care to prevent and correct promptly any harassment. Additionally, Defendant at least in some regard appears to admit that Plaintiff's supervisor called Plaintiff a "dog:"

it was not intended in any way as a derogatory statement. "Big Dog" is a brand name that appears on t-shirts, and colloquially refers to a man's large stature. It is generally considered complimentary (e.g., "Now you're playing with the Big Dog" used to refer to a formidable opponent). To the extent Plaintiff was offended by the comment, and communicated his concern to Mr. Fish, Mr. Fish stopped using the term immediately.

(Def.'s Answer to Pl.'s Interrog. No. 1 (Dkt. No. 46 at 49).) Plaintiff, however, alleges that Mr. Fish did

1 not stop despite repeated objections by Plaintiff (Dkt. No. 46 at 28–29), until the meeting in which Mr.  
2 Fish allegedly exposed Plaintiff to the noose and hanging gorilla. (Pl.’s Resp. (Dkt. No. 45 at 3).) At least  
3 for the purposes of summary judgment, the Court finds that Defendant has failed to show that as a matter  
4 of law, Plaintiff cannot hold Defendant vicariously liable for the alleged harassment by Plaintiff’s  
5 supervisor.

6 The Court bears in mind that “when a court too readily grants summary judgment, it runs the risk  
7 of providing a protective shield for discriminatory behavior that our society has determined must be  
8 extirpated.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004). Given the Ninth  
9 Circuit’s emphasis on “zealously guarding an employee’s right to a full trial [in employment  
10 discrimination cases], since discrimination claims are frequently difficult to prove without a full airing of  
11 the evidence and an opportunity to evaluate the credibility of the witnesses[,]” *id.*, the Court DENIES  
12 Defendant’s motion for summary judgment on Plaintiff’s Title VII claims.

#### 13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court hereby DENIES IN PART Defendant’s Motion for  
15 Summary Judgment (Dkt. No. 41). Defendant’s motion is GRANTED IN PART as to Plaintiff’s § 1983  
16 claims and discrete acts outside the statute of limitations period. Plaintiff is INSTRUCTED to file an  
17 Amended Complaint, within ten days of this order, identifying the proper Defendant, Todd Pacific  
18 Shipyards Corporation.

19 DATED this 16th day of April, 2008.

20   
21 John C. Coughenour  
22 UNITED STATES DISTRICT COURT  
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